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NO. PD-1003-20

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

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COURT OF CRIMINAL APPEALS
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JUSTIN KING,
Appellant

v.

THE STATE OF TEXAS,
Appellee

From the 10th Court of Appeals, Waco
Cause No. 10-19-00354-CR

BRIEF FOR APPELLANT JUSTIN KING

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Identity of Judge, Parties and Counsel

Appellant, pursuant to Rule of Appellate Procedure 38.1(a) and 68.4(a), provides the following list of all parties to the trial court's judgment and the names and addresses of all trial and appellate counsel.

THE TRIAL COURT:

Hon. Patrick H. Simmons — Trial Court Judge
87th District Court, Freestone County
P.O. Box 722
Fairfield, Texas 75840

THE DEFENSE:

Justin King — Appellant

Michael L. Dahlenburg — Trial Counsel for Appellant
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THE PROSECUTION:

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Assistant County Attorney — for the State

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Fairfield, Texas 75840

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Statement of the Case

Appellant Justin King pleaded guilty to evading arrest or detention in a vehicle without a plea recommendation. A jury assessed his punishment at 20 years' imprisonment and a $10,000 fine. A majority of the court of appeals affirmed, holding that King was not harmed by the trial court holding pretrial proceedings in his absence. Chief Justice Gray dissented, observing that it cannot be determined what happened during an unrecorded bench conference held in King's absence (who received a maximum sentence) and so it cannot be determined whether King was harmed.

Statement Regarding Oral Argument

The Court has advised the parties that oral argument will not be permitted.

Ground Presented

Sole Ground: Can harmlessness be presumed from a silent record when a defendant has been denied his constitutional and statutory rights to be present during a pretrial proceeding?

Statement of Facts

On the morning of trial, Justin King's attorney advised the trial court that his client would be pleading "not guilty" and insisting on a trial. Apparently, King had been vacillating on this issue.

After qualifying the venire panel, the trial court excused them to a waiting area. (2RR5-8) The court then directed defense counsel to present the defense motion in limine though his client had not yet been brought to the courtroom. (2RR8) The attorneys discussed the motion with the court. The court and the attorneys also discussed how they were going to conduct a punishment-only voir dire, understanding that Appellant intended to plead guilty. (2RR8-9) Defense counsel questioned whether King would stipulate to the enhancement allegation or whether he would "want to agree to anything." Counsel expressed concern that King would be "disruptive in the courtroom." After additional discussion, the court indicated that King would be brought into the courtroom. The court then granted the motion in limine. (2RR9)

Then the court asked defense counsel if there was anything else that needed to be addressed.

Counsel: Other than the fact that he believes he can fire me and get another attorney and delay this trial.

The Court: No, I'm not going to delay it—

Counsel: Oh, I agree.

(2RR10)

The record next reflects that the trial court conducted a "bench discussion, off the record." Based on the chronological notation in the margin, this unrecorded bench conference lasted approximately one and one-half to two minutes. (2RR10)

And then the court continued to discuss the case with the attorneys without King present. (2RR10-11)

After that, King was brought into the courtroom. (2RR11)

The State then informed the court and the defense that it was proceeding on only the evading charge. The State advised that it would not proceed at that time on a theft charge pending under another indictment or on some unindicted theft charges. Defense counsel was unaware that this was the State's intention. (2RR11) When defense counsel asked how the State intended to handle the theft charges, the State informed counsel that

evidence regarding the thefts would be offered as unadjudicated extraneous conduct. (2RR11-12)

The trial court then discussed with King (without his attorney present) whether he intended to plead "guilty" or "not guilty" because defense counsel had informed the court that morning that King intended to plead "not guilty" and insist on a trial even though he had previously indicated otherwise.

Without having an opportunity to consult with counsel about the motion in limine or voir dire or any other matters previously addressed by the court and counsel that morning in King's absence, King told the trial court (without counsel present) that he would plead "guilty" and have a punishment hearing before the jury. Because defense counsel had stepped out of the courtroom, the court told Mr. Snow, the defense investigator, told to locate Mr. Dahlenburg, trial counsel, and inform him of King's intentions. (2RR13)

Before the venire panel returned to the courtroom, the trial court again confirmed that this was King's intention. (2RR16-17)

The court and attorneys conducted the voir dire examination, and a jury was seated. (2RR18-73)

The next morning, King pleaded "guilty" to the charge of evading arrest or detention in a vehicle. (3RR7-8) He pleaded "true" to an enhancement allegation. (3RR12)

The State called several witnesses over the course of two days.

King testified in his own defense and called his former wife as a witness. (4RR36-78)

The jury assessed his punishment at 20 years' imprisonment and a $10,000 fine. (CR49), (4RR105-06)

Summary of the Argument

After qualifying the venire panel, the trial court conducted extensive pretrial proceedings in Appellant' Justin King's absence. These proceedings encompassed, among other things, King's intended plea to the indictment, his plea to an enhancement allegation, whether his trial counsel should withdraw, whether he would be disruptive in the courtroom, and how voir dire should be conducted (depending on his plea).

Importantly, the trial court conducted a bench conference of approximately 2 minutes that was not recorded.

The State surprised defense counsel by announcing in the midst of this proceedings that it intended to proceed on only one of two indicted felony cases rather than both.

The trial court pressed King to decide whether he would plead guilty to this sole charge without allowing him time to confer with his counsel to discuss any of the matters that had been addressed in his absence.

The trial court's actions violated King's Sixth Amendment right to be present and his statutory right under article 28.01 to be present. The Waco majority agreed that the court erred but found the errors harmless.

Chief Justice Gray dissented, observing primarily that it could not be determined (due to the unrecorded bench conference) the full extent of what transpired in King's absence during the pretrial proceedings. He accordingly concluded that he could not determine from the record that these errors were harmless.

King agrees with Chief Justice Gray that the record contains insufficient data to determine harm—which means the errors require reversal.

Alternatively, applying the constitutional and statutory harm analyses to the limited record available, the Court should conclude that King suffered harm from these errors and reversal is required.

Argument

Can harmlessness be presumed from a silent record when a defendant has been denied his constitutional and statutory rights to be present during pretrial proceedings?

Because this appeal presents both constitutional and statutory errors, the Court must apply different harm analyses. Because of the unrecorded 2-minute bench conference, the record contains insufficient data to assess harm, and reversal is required. Alternatively, because the errors impacted King's plea to the indictment, his plea to the enhancement allegation, whether his appointed counsel should withdraw, and whether he would be disruptive at trial, the limited record demonstrates that the errors harmed King, and reversal is required.

A. A defendant has an absolute and unwaivable constitutional and statutory right to be present at pretrial proceedings

A criminal defendant has the absolute right to be physically present at all proceedings against him, including pretrial proceedings. This right exists under both the Confrontation Clause of the federal constitution and as a matter of statutory law. The right is unwaivable at least as a matter of statutory law.

First, the Confrontation Clause of the Sixth Amendment confers "the absolute requirement that a criminal defendant who is threatened with loss of liberty be physically present at all phases of proceedings against him."[1] *Jasper v. State*, 61 S.W.3d 413, 423 (Tex. Crim. App. 2001); *Baltierra v. State*, 586 S.W.2d 553, 556 (Tex. Crim. App. 1979) (citing *Lewis v. United States*, 146 U.S. 370 (1892)); *Smith v. State*, 534 S.W.3d 87, 90 (Tex. App.—Corpus Christi-Edinburg 2017, pet. ref'd).

This right of presence guarantees, among other things, the right to confer with counsel and the right to give advice or suggestions to counsel. *See Snyder v. Massachusetts*, 291 U.S. 97, 106 (1934); *Baltierra*, 586 S.W.2d at 556.

In addition to this absolute constitutional requirement, article 28.01, section 1, confers an unwaivable statutory requirement that a defendant be present "during any pre-trial proceeding." TEX. CODE CRIM. PROC. art. 28.01, § 1. This statutory right of presence is unwaivable until after the jury has

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[1] This constitutional right may be waived by the defendant's own conduct that disrupts the proceedings after being warned that he may be removed for such conduct. *See Illinois v. Allen*, 397 U.S. 337, 343 (1970); *Smith v. State*, 534 S.W.3d 87, 90 (Tex. App.—Corpus Christi-Edinburg 2017, pet. ref'd).

been selected or after the defendant's plea has been entered to the charging instrument in a bench trial. *Miller v. State*, 692 S.W.2d 88, 91 (Tex. Crim. App. 1985) (*see* TEX. CODE CRIM. PROC. art. 33.03).

A "proceeding" within the meaning of article 28.01 is one that is adversarial in nature. *Lawton v. State*, 913 S.W.2d 542, 550 (Tex. Crim. App. 1995). A proceeding where (1) the attorneys are present, (2) the court considers and rules on a motion, and (3) the proceeding is transcribed by the court reporter and included in the appellate record is a "pre-trial proceeding" within the meaning of the statute. *Adanandus v. State*, 866 S.W.2d 210, 219 (Tex. Crim. App. 1993).

B. The trial court erroneously conducted pretrial proceedings in King's absence beyond merely ruling on his motion in limine

The Waco majority concluded that King was not harmed by the trial court conducting pretrial proceedings in his absence because his absence had no impact on the outcome of the motion in limine—the trial court granted King's motion in limine—and because he had adequate time to consult with counsel before pleading guilty to the jury the next day. *King v. State*, No. 10-19-00354-CR, 2020 WL 5667148, at *3 (Tex. App.—Waco Sept. 23, 2020, pet. filed) (mem. op., not designated for publication).

As Chief Justice Gray's dissent noted, however, the majority's focus was too narrow because the record discloses that the pretrial proceedings encompassed several additional matters beyond the motion in limine and, perhaps—but indecipherable from the record, additional matters that do not appear in the record. *Id.*, 2020 WL 5667148, at *4 (Gray, C.J., dissenting).

The record discloses that numerous matters were addressed in King's absence that directly impacted the pleas he would enter, how the trial would be conducted, and who his attorney would be, among other things. The pretrial proceedings included:

- argument and ruling on the defense motion in limine (2RR8-9);
- discussion of whether King would plead "guilty" (2RR8-11);
- discussion of how to conduct voir dire depending on his plea (2RR10);
- discussion of how King would plead to the enhancement (2RR9);
- discussion of whether King would be disruptive (2RR9);
- discussion of whether trial counsel should withdraw—for reasons unknown from the record (2RR10);
- trial court discussion with King (without counsel) about whether he would plead "guilty" immediately following State's announcement that it would proceed on only 1 of the 2 indicted cases and without opportunity for King to consult with his counsel about any of the

> matters that had been taken up in his absence or how the State's announcement may impact his decision to plead "guilty." (2RR11-13)

In addition to these matters that appear on the record from the pretrial hearing, the trial court conducted an unrecorded bench conference that lasted approximately one and one-half to two minutes. (2RR10)

While there was some concern expressed on the record by King's counsel about him being disruptive, the record contains no instance where King was in fact disruptive or warned by the court that disruptive behavior could result in his removal from the courtroom. (2RR9) Accordingly, the *Illinois v. Allen* disruptive conduct exception does not apply to diminish his constitutional right to be present. *See Smith*, 534 S.W.3d at 90-91.

The trial court took up and the parties addressed numerous adversarial matters in King's absence which matters are all included within the pretrial "proceedings" conducted on that occasion. *See Lawton*, 913 S.W.2d at 550; *Adanandus*, 866 S.W.2d at 219.

Concerning the unrecorded bench conference, it simply cannot be determined whether this conference was adversarial due to the failure to make a record of that part of the proceedings.

This Court has held that a party must object whenever a court reporter fails to record a bench conference. *See Valle v. State*, 109 S.W.3d 500, 508-09 (Tex. Crim. App. 2003). King suggests that *Valle* should not apply here because nothing from the record would support a finding that King's trial counsel knew that the court reporter was not recording the bench conference. A party cannot object to a failure to make a record if he does not know the record is not being made. Rather, the Court should presume from the silent record that the unrecorded bench conference was adversarial in nature. *Cf. Ex parte Coty*, 418 S.W.3d 597, 606 (Tex. Crim. App. 2014) (addressing when appropriate for court to presume due process violation or to shift burden to State to disprove falsity). At minimum, the Court should require the State to disprove that the unrecorded bench conference was adversarial. *Id.*

Regardless of which aspects of the above the Court includes within the parameters of pretrial proceedings, the trial court committed constitutional and statutory error by conducting pretrial proceedings in King's absence. *Adanandus*, 866 S.W.2d at 219; *Smith*, 534 S.W.3d at 92.

C. These errors are subject to 2 separate harm analyses

As discussed above, the conduct of pretrial proceedings in a defendant's absence violates both the Sixth Amendment and article 28.10. Accordingly, an appellate court evaluates harm under both the constitutional and non-constitutional standards of Rule 44.2.

Regardless of which test the Court is applying, it must be remembered that neither party bears the burden of showing harm or harmlessness. *VanNortrick v. State*, 227 S.W.3d 706, 709 (Tex. Crim. App. 2007).

Further, for an error like this, the harm analysis should focus on the rights at issue under the Sixth Amendment and article 28.10 and the extent to which those rights (and the purposes behind them) were "thwarted by the error." *See Gray v. State*, 233 S.W.3d 295, 299 (Tex. Crim. App. 2007) (quoting *Ford v. State*, 73 S.W.3d 923, 925 (Tex. Crim. App. 2002)) (discussing proper harm analysis for erroneous denial of request for jury shuffle).

As this Court observed in *Adanandus*, the constitutional standard focuses on "the effect of the defendant's absence on the advancement of his defense" rather than on the outcome. *Adanandus*, 866 S.W.2d at 219-20.

1. The Court evaluates the harm of constitutional error under the "reasonably substantial relationship" test and under Rule 44.2(a)

When a defendant's constitutional right to be present is erroneously denied, the Court evaluates harm under the "reasonably substantial relationship" test. *Adanandus*, 866 S.W.2d at 219 (citing *Snyder*, 291 U.S. at 105-08); *see Routier v. State*, 112 S.W.3d 554, 576 (Tex. Crim. App. 2003).

But the Court also considers whether, under Rule 44.2(a), it can say beyond a reasonable doubt that the defendant's absence had no effect on the conviction or punishment. *See Adanandus*, 866 S.W.2d at 219-20; *see also* TEX. R. APP. P. 44.2(a).

The Supreme Court explained the reasonably substantial relationship test in *Snyder*.

> [I]n a prosecution for a felony the defendant has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.
>
> So far as the Fourteenth Amendment is concerned, the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.

Snyder, 291 U.S. at 105-06, 107-08 (quoted by *Routier*, 112 S.W.3d at 577; *Adanandus*, 866 S.W.2d at 219).

2. The Court evaluates the harm of statutory error under the substantial rights test of Rule 44.2(b)

Conversely, statutory error under article 28.10 is subject to the substantial rights test of Rule 44.2(b).

Non-constitutional error must be disregarded unless it affects the appellant's substantial rights. TEX. R. APP. P. 44.2(b).

> [An appellate] court "will not overturn a criminal conviction for non-constitutional error if the appellate court, after examining the record as a whole, has fair assurance that the error did not influence the jury, or influenced the jury only slightly." In considering the potential to harm, the focus is not on whether the outcome of the trial was proper despite the error, but whether the error had a substantial or injurious effect or influence on the jury's verdict. A conviction must be reversed for non-constitutional error if the reviewing court has grave doubt that the result of the trial was free from the substantial effect of the error. "Grave doubt" means that "in the judge's mind, the matter is so evenly balanced that he feels himself in virtual equipoise as to the harmlessness of the error." "[I]n cases of grave doubt as to harmlessness the petitioner must win."

Barshaw v. State, 342 S.W.3d 91, 93-94 (Tex. Crim. App. 2011) (quoting *Schutz v. State*, 63 S.W.3d 442, 444 (Tex. Crim. App. 2001); *Burnett v. State*, 88 S.W.3d 633, 637-38 (Tex. Crim. App. 2002)) (footnotes omitted) (other citations omitted).[2]

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[2] The "grave doubt" standard is derived from federal law. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

The right of presence includes, among other things, the right to confer with counsel and the right to give advice or suggestions to counsel. *See Snyder*, 291 U.S. at 106; *Baltierra*, 586 S.W.2d at 556. Accordingly, a harm analysis under Rule 44.2(b) should ask whether the erroneous exclusion of the defendant from the courtroom "had a substantial or injurious effect or influence" on their right to confer with counsel and to give advice or suggestions to counsel. *Cf. Gray*, 233 S.W.3d at 299.

D. Harmlessness cannot be presumed from a silent record

Regardless of whether the error is constitutional or statutory, a small number of cases exists in which the record contains insufficient data for a meaningful harmless error analysis. This is such a case.

Aside from a narrow category of federal constitutional errors labeled as structural, all errors are subject to a harmless error analysis. *Cain v. State*, 947 S.W.2d 262, 264 (Tex. Crim. App. 1997). Rather than identifying categories of error that are immune from a harm analysis, "appellate courts should more appropriately determine whether, for any particular case, a meaningful harm analysis is possible." *VanNortrick*, 227 S.W.3d at 709.

In a very small number of cases, "the error involved defies analysis by harmless error standards or the data is insufficient to conduct a meaningful

harmless error analysis." *Cain*, 947 S.W.2d at 264; *see VanNortrick*, 227 S.W.3d at 714. In these situations, an appellate court should hold that the error cannot be found harmless.

Texas courts have generally identified 2 categories of error that fit within this narrow group of cases—those in which proper voir dire questions were disallowed and those in which trial courts failed to properly admonish as to deportation consequences where the defendant's status was unclear. *E.g.*, *VanNortrick*, 227 S.W.3d at 713-14 (deportation consequences); *Gonzales v. State*, 2 S.W.3d 600, 606 (Tex. App.—Texarkana 1999, pet. ref'd) (disallowing proper voir dire question "will rarely be harmless").

The Waco majority concluded that King was not harmed by the trial court conducting pretrial proceedings in his absence because his absence had no impact on the outcome of the motion in limine—the trial court granted King's motion in limine—and because he had adequate time to consult with counsel before pleading guilty to the jury the next day. *King*, 2020 WL 5667148, at *3.

As Chief Justice Gray's dissent noted, however, the majority's focus was too narrow because the record discloses that the pretrial proceedings

involved several additional matters beyond the motion in limine. *Id.*, 2020 WL 5667148, at *4 (Gray, C.J., dissenting).

The record discloses that numerous matters were addressed in King's absence and before the unrecorded bench conference that directly impacted the pleas he would enter, how the trial would be conducted, and who his attorney would be, among other things. The pretrial proceedings included:

- argument and ruling on the defense motion in limine (2RR8-9);
- discussion of whether King would plead "guilty" (2RR8-11);
- discussion of how King would plead to the enhancement (2RR9);
- discussion of whether King would be disruptive (2RR9);
- discussion of whether trial counsel should withdraw—for reasons unknown from the record (2RR10);

The unrecorded bench conference occurred after all of these matters were addressed in King's absence. (2RR10)

The unrecorded bench conference occurred immediately after trial counsel advised the court that King wanted him to withdraw. It is entirely possible that counsel should have withdrawn due to a conflict of interest or for any number of valid reasons. And perhaps this was discussed during the unrecorded bench conference. Or perhaps not. But this Court cannot

determine from the silent record whether this was actually discussed or whether trial counsel should have withdrawn. It is clear, however, that King was not given the opportunity to address whether trial counsel should withdraw.

The unrecorded bench conference may also have embraced the pleas that King intended to enter—both to the charged offense and to the enhancement allegation—but, again, this cannot be determined from the silent record.

The unrecorded bench conference may have addressed King's potential for disruptive behavior during trial, but again, this cannot be determined from the silent record.

As Chief Justice Gray observed in his dissent, "I do not know what occurred during the hearing off the record; and neither do you. Under the applicable standard of review, because I do not know what happened, I cannot reach the necessary conclusion to hold the error harmless." *King*, 2020 WL 5667148, at *4 (Gray, C.J., dissenting).

Chief Justice Gray is correct. Under the substantial relationship test, the record contains insufficient data for an appellate court to determine whether that the trial court's error in proceeding in King's absence had no

impact on the advancement of his defense. *See Anandus*, 866 S.W.2d at 219-20.

The Court must also evaluate the constitutional error under the standard harm analysis for constitutional errors. *Id.*; *see* TEX. R. APP. P. 44.2(a). Because this error impacted how King chose to plead to the indictment and the enhancement allegation and whether he was entitled to new counsel, an appellate court simply cannot determine what impact the error had on either his conviction or sentence. In this regard, it is noteworthy that he received a maximum sentence. *See King*, 2020 WL 5667148, at *4 (Gray, C.J., dissenting).

Conversely under the significant impairment test for non-constitutional error, the record contains insufficient data for an appellate court to determine whether the erroneous exclusion of King from the courtroom "had a substantial or injurious effect or influence" on his right to confer with and give advice or suggestions to counsel about each of the matters that may have been discussed during the unrecorded bench conference. *Cf. Gray*, 233 S.W.3d at 299.

At best, this Court should harbor "grave doubt" that King's right to confer with and give advice or suggestions to counsel was free from the

substantial effect of the error. "[I]n cases of grave doubt as to harmlessness, [the error is not harmless]." *Barshaw*, 342 S.W.3d at 94. Or as this Court observed in *Llamas*, the Court "cannot be sure that the error did not have a substantial or injurious effect." *Llamas v. State*, 12 S.W.3d 469, 472 (Tex. Crim. App. 2000).

For each of these reasons, the record contains insufficient data for a meaningful harm analysis, and the trial court's errors should be held to require reversal.

E. Even if a harm analysis could be done, the errors require reversal

A recurrent theme from this Court's decisions on the conduct of harm analyses with insufficient or limited data is that an appellate court must nevertheless attempt to perform a harm analysis.

> When we stated in *Cain* that some errors may "defy" harm analysis we did not mean that a harm analysis need not be conducted. We meant simply that some errors will not be proven harmless because harm can never be determined due to the lack of data needed for analysis.

Llamas, 12 S.W.3d at 471.

This Court went on to observe in *Llamas* that, although the court of appeals opined that the data was insufficient for a meaningful harm analysis, the court of appeals nevertheless essentially conducted a harm analysis. *Id.*

at 472. And this Court then reviewed that harm analysis before declaring that the error required reversal. *Id.*

King continues to insist that the data in his case is insufficient for a meaningful harm analysis, but if the Court determines otherwise, the errors were harmful and reversal is required.

1. The constitutional error was harmful under the "reasonably substantial relationship" test and under Rule 44.2(a)

When a defendant's constitutional right to be present is erroneously denied, the Court evaluates harm under Rule 44.2(a) and under the "reasonably substantial relationship" test. *Adanandus*, 866 S.W.2d at 219-20 (citing *Snyder*, 291 U.S. at 105-08); *see Routier*, 112 S.W.3d at 576; *see also* TEX. R. APP. P. 44.2(a).

The "reasonably substantial relationship" analysis focuses on "the effect of the defendant's absence on the advancement of his defense" rather than on the outcome. *Adanandus*, 866 S.W.2d at 219-20. In conducting this analysis, the Court should bear in mind the purposes for the constitutional right to be present, which include the right to confer with counsel and to give advice and suggestions to counsel regarding the advancement of the defense. *See Snyder*, 291 U.S. at 106; *Baltierra*, 586 S.W.2d at 556. And the

Court should consider this in light of the matters addressed in King's absence during the pretrial hearing.

Defense counsel stated in King's absence that King wanted him to withdraw. (2RR10) Yet counsel never stated the reason(s) for this. And the trial court did not afford King the opportunity to address this issue or discuss the matter further with his appointed counsel.

Further, defense counsel was unsure whether King intended to plead "guilty." (2RR8-11) The trial court and parties discussed at length various considerations about how the trial would be conducted, depending on how he pleaded. Then, King was brought into the courtroom without the benefit of participating in those discussions. And in the absence of counsel, he was put on the spot and had to answer the trial court about his intended plea. (2RR11-13) While it is possible that his answer would not have changed, he was denied the opportunity to confer with counsel before answering the court. And once he made that assertion to the trial court, he may have felt

powerless (or certainly reluctant) to change his mind even though he had an additional day before he actually entered his plea.[3]

A critical matter addressed—and directly related to the decision to plead "guilty"—was trial counsel's apparent ignorance of the State's intention to proceed on only the evading charge. (2RR11-12) This changed the entire tenor of the trial because it drastically altered the theory of admissibility for evidence related to the now-extraneous theft charges. King may have chosen to plead "not guilty" once he understood the ramifications of not being tried for two distinct charges in a single proceeding. But he never had the opportunity to confer with his attorney about this (even though he heard the discussion) before the trial court put him on the spot about his intended plea.

Next, trial counsel suggested that King might be disruptive during trial. (2RR9) This issue was never addressed in King's presence. He was denied the opportunity to confer with trial counsel about his behavior during trial and cast in a bad light before the trial court.

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[3] The Waco majority found this extra day for "reflection" a meaningful data point in its harm analysis. *King v. State*, No. 10-19-00354-CR, 2020 WL 5667148, at *3 (Tex. App.—Waco Sept. 23, 2020, pet. filed) (mem. op., not designated for publication).

Next, trial counsel expressed uncertainty about how King would plead to the enhancement allegation. (2RR9) This issue was never addressed in King's presence. He was denied the opportunity to confer with trial counsel about his options regarding the enhancement allegation, particularly in view of the State's surprise announcement that it would proceed on only the evading charge.

And finally, though the trial court granted the defense motion in limine, King's absence denied him the opportunity to confer with counsel about how this ruling would impact his decision on how to plead to the indictment or the enhancement allegation, particularly in view of the State's surprise announcement that it would proceed on only the evading charge.

In *Adanandus*, the trial court allowed additional questioning in the defendant's presence of 8 veniremembers who had been previously questioned in his absence and 3 of whom had been successfully challenged for cause. *See Adanandus*, 866 S.W.2d at 217. As Chief Justice Gray noted, the trial court here could have explained to King on the record what had happened in his absence—but the court did not. *See King*, 2020 WL 5667148, at *4 n.1 (Gray, C.J., dissenting).

Other matters addressed in Adanandus's absence included a defense motion, a defense request to make a bill of exceptions, a jury shuffle, peremptory challenges and publicity. *See Adanandus*, 866 S.W.2d at 219. This Court determined that Adanandus's presence was not essential to the advancement of his defense for any of these. *Id.* at 220.

Conversely, King's presence here was essential to address and confer with counsel on several of the matters addressed in his absence including his plea to the indictment, his plea to the enhancement allegation, whether his appointed counsel should withdraw, and whether he would be disruptive at trial. While the trial court may not have changed any of its rulings, King's presence during the pretrial proceedings was essential to each of these matters. *Cf. id.*

And for the same reasons, this Court simply cannot say beyond a reasonable doubt that the trial court's denial of King's right to be present and confer with counsel had no effect on his conviction or punishment. *See* TEX. R. APP. P. 44.2(a). Because the error impacted how King chose to plead to the indictment and the enhancement allegation and whether he was entitled to new counsel, the error necessarily impacted both his conviction and

sentence. And it is noteworthy that he received a maximum sentence. *See King*, 2020 WL 5667148, at *4 (Gray, C.J., dissenting).

For each of these reasons, the constitutional error requires reversal.

2. The statutory error was likewise harmful

As previously explained, a harm analysis under Rule 44.2(b) should ask whether the erroneous exclusion of the defendant from the courtroom "had a substantial or injurious effect or influence" on their right to confer with counsel and to give advice or suggestions to counsel. *Cf. Gray*, 233 S.W.3d at 299. For the same reasons cited above for the constitutional error harm analysis, King's exclusion requires reversal under Rule 44.2(b).

King's presence was essential to address and confer with counsel on several of the matters addressed in his absence including his plea to the indictment, his plea to the enhancement allegation, whether his appointed counsel should withdraw, and whether he would be disruptive at trial. The trial court's statutory error denied him this opportunity. Accordingly, his exclusion necessarily had a substantial and injurious influence on his ability to confer with counsel about these matters before being put on the spot by the trial court about his intentions.

Alternatively, this Court must harbor at least "grave doubt" about the impact of this statutory error on King's ability to confer with counsel. "[I]n cases of grave doubt as to harmlessness, [the error is not harmless]." *Barshaw*, 342 S.W.3d at 94.

For each of these reasons, the trial court's erroneous denial of King's statutory right to be present under article 28.01 requires reversal.

F. This Court should reverse and remand to the trial court

The trial court denied King's Sixth Amendment and statutory rights to be present at pretrial proceedings. The record contains insufficient data to determine whether this harmed King. Alternatively, King suffered harm from these errors.

Either way, this Court should reverse the judgment of the court of appeals and remand this cause to the trial court for a new trial. *See* TEX. R. APP. P. 78.1(d); *Jordan v. State*, 593 S.W.3d 340, 348 (Tex. Crim. App. 2020).

Prayer

WHEREFORE, PREMISES CONSIDERED, Appellant Justin King asks the Court to: (1) reverse the judgment of the court of appeals and remand this cause to the trial court for a new trial; and (2) grant such other and further relief to which he may show himself justly entitled.

Respectfully submitted,

/s/ Alan Bennett
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